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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 686

RALPH R. BENSON, *Petitioner,*

vs.

STATE OF CALIFORNIA, *Respondent.*

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

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STATE OF CALIFORNIA, *Respondent.*

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of Ralph R. Benson for a writ of certiorari to review a judgment of the District Court of Appeal, Second Appellate District, State of California, made and entered by said court on the 6th day of August, 1962, a copy of which is hereto appended, respectfully shows to this honorable court:

Opinions of the Courts Below.

No opinion was rendered by the trial court.

The opinion of the District Court of Appeal, Second Appellate District, State of California, has been reported officially at 206 A. C. A. 608 and unofficially at 23 Cal. Rptr. 908. A copy of the opinion rendered by said court is annexed to this petition as the Appendix.

No opinion was rendered by the Supreme Court of California. Hearing by said court was denied.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The judgment of the District Court of Appeal was dated and filed August 6, 1962.

2. A petition for rehearing was denied by the District Court of Appeal on August 24, 1962. A petition for hearing by the California Supreme Court was denied on October 2, 1962. A stay of the remittitur was granted by the District Court of Appeal pending determination of this petition for a Writ of Certiorari.

3. The statutory provision believed to confer jurisdiction upon the court to review the judgment of the court below is United States Code, Title 28, Section 1257(3).

Questions Presented for Review.

I.

Have the California Courts denied petitioner due process of law under the Federal Constitution in holding that he has no standing to rely on the defense of entrapment because he refused to admit the commission of the offense charged?

II.

Has the California District Court of Appeal denied petitioner due process of law because it based its affirmance of conviction on its finding that petitioner made a concession that a *prima facie* case of conspiracy existed when in fact no such concession was ever made?

III.

Have the California Courts denied petitioner due process and equal protection of the law by applying a construction of a phrase of a state criminal statute to

petitioner contrary to the construction of the same phrase in prior civil cases?

IV.

Is it a violation of the petitioner's rights under the Fourteenth Amendment, where the prosecutor's agents obtained entry by misrepresentations into the private office of the petitioner, for the California trial court to admit into evidence a recording of conversations of the prosecutor's agents with the petitioner which the agents surreptitiously obtained while in the petitioner's office and to admit the testimony of the agents as to the conversations where objection was duly made on said constitutional grounds?

Constitutional Provisions and Statute Which the Case Involves.

1. *The Fourth Amendment provides* —

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. *The Fifth Amendment provides* —

"No person shall be compelled in any criminal case to be a witness against himself."

3. *The Fourteenth Amendment provides* —

". . . nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

4. *Section 556 of the California Insurance Code provides —*

"Section 556. *False or fraudulent claim; penalty.* It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make or subscribe any writing, with intent to present or use the same, or allow it to be presented or used in support of any such claim.

Every person who violates any provision of this Section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both.
(Stats. 1935, c. 145, p. 511, Section 556.)"

Statement of the Case.

The petitioner, Ralph R. Benson, is an attorney at law admitted into practice in 1947.

An information filed by the District Attorney charged three counts:

Count 1 alleged petitioner conspired with Dr. Isaac Matloff and Dr. Edwin T. Harder to commit Grand Theft and to violate Section 556 of the Insurance Code.

Count 2 charged the petitioner and Dr. Matloff and Dr. Harder with a violation of Section 556 of the Insurance Code. It alleged the acts constituting the violation occurred March 10, 1960.

Count 3 charged the petitioner, Dr. Harder and Dr. Matloff with a violation of Section 556 of the Insurance Code. It alleged the acts constituting the violation occurred April 28, 1960.

Petitioner was found guilty on all counts by the trial court sitting without a jury.

The following facts were presented:

The testimony upon which the prosecution relies was that of the witnesses William Buchholz and Robert Meng. Mr. Meng was a Los Angeles County District Attorney Investigator and Mr. Buchholz was working under Mr. Meng's supervision. Each contacted Dr. Matloff representing they had been involved in rear-end automobile collisions. Buchholz had had such a collision which resulted in minor damage to his auto. He had filed a report of accident and bodily injury with the California Department of Motor Vehicles. [R. T. pp. 950-970; also Defendant's Exhibit G.] Following Dr. Matloff's acceptance of Buchholz as a patient, the District Attorney's Office had him examined for bodily injury by an orthopedist who testified at the trial that he found no injury. Mr. Meng had been involved in no accident, but he told Dr. Matloff that he had been struck by Hawkins. Hawkins was another District Attorney investigator. Dr. Matloff recommended that Buchholz and Meng hire petitioner as their attorney. Petitioner did not solicit either agent but received telephone calls from them. Petitioner then dispatched an attorney employee to see Buchholz and Meng at their homes. Each signed a contingent fee agreement with petitioner.

Buchholz signed his fee agreement on December 18, 1959. On January 14, 1960 he telephoned petitioner for an appointment which was made for that day. This was Buchholz's one and only personal contact with petitioner prior to the trial. He was, when he arrived at petitioner's office equipped with a minifon recorder

which recorded his conversation with petitioner that day. In substance, he told petitioner that there was "nothing wrong" with him. [R. T. p. 1037.] He testified however that on the prior occasion of his meeting with petitioner's employee and in his telephone conversations with petitioner, he had never stated to either that he had not sustained an injury in the accident. When he entered petitioner's office on the 14th, he limped. [R. T. p. 1034.] On February 11, Buchholz mailed petitioner a questionnaire he had completed. He stated thereon that his neck and back were bothering him. [R. T. pp. 296-310; pp. 858-861; People's Exs. 12 and 14.] On March 4, Dr. Matloff submitted his itemized bill and medical report on Buchholz to petitioner. It stated Buchholz had sustained a whiplash injury to his back. Buchholz had been involved in an automobile accident a month before he met Dr. Matloff and had retained an attorney to prosecute a claim for back injury [R. T. pp. 920-940.]

Meng contacted petitioner on March 25, 1960. He telephoned petitioner stating he had told his doctors he was not hurt. Prior to this date Dr. Matloff had referred Meng to Dr. Harder. On April 18, Dr. Matloff made up his medical report and showed it to Meng. Meng asked him if petitioner knew the medical report and bill Dr. Matloff had made up were false. Dr. Matloff warned Meng not to tell petitioner that he was not hurt and stated petitioner did not know the medical bill and report were false. [R. T. pp. 744-750.] On April 19, 1960 Meng telephoned petitioner for an appointment. He arrived that day equipped with a minifon recorder which recorded petitioner's conversation with Meng.

The following was heard from the recording: Meng told petitioner that the report was a pack of lies. When petitioner asked "Where are the lies?" Meng evaded. Petitioner asked Meng whether he made the 20 visits to Dr. Matloff's office. Meng said that was correct [R. T. p. 741, lines 10-17], but he told petitioner that the date of the first treatment was not correct. Petitioner asked for the correct date. Meng told petitioner that he could not remember the exact date. Petitioner then said: "If this is untrue, let's forget the whole thing. I will not be a party to a fraud." Meng said: "I don't know."

On April 21, 1960, Dr. Harder sent petitioner his itemized bill and report on Meng. He diagnosed a whiplash.

Eventually, petitioner forwarded the medical reports of Dr. Matloff and Dr. Harder to the public liability carriers of the adverse drivers in the Buchholz and Meng cases.

The defendants were thereafter arrested.

Buchholz and Meng admitted that they had no search warrants or warrants of arrest at the time of entries into petitioner's office. [R. T. pp. 335-344; 542-560; 716.]

State of the Proceedings at Which and Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

I. AS TO ENTRAPMENT: This issue was raised throughout the trial and on the motion for a new trial [C. T. pp. 28-30], and in the briefs in the District Court of Appeal (Op. Br. pp. 55-79), and Supreme Court of California (Pet. for Hear., pp. 2-16); and

either denied or ignored. The briefs are filed herein as part of the record. This question was discussed in the cases cited by petitioner to the California courts:

Woo Wai v. United States, 223 Fed. 412;

Voves v. United States, 249 Fed. 191;

Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413;

Henderson v. United States, 237 F. 2d 169.

and decided in favor of petitioner's position that a standing to assert this defense is a protected constitutional right under due process of law under the United States Constitution.

II. AS TO THE UNWARRANTED CONCESSION OF A PRIMA FACIE PROOF OF CONSPIRACY: This statement was in the opinion of the District Court of Appeal. In a petition for a rehearing to that court (pp. 12-13), petitioner pointed out he had never conceded a *prima facie* showing of conspiracy and had objected throughout the trial to the introduction of extra-judicial statements of the alleged co-conspirators. That petition was denied; a petition for hearing to the Supreme Court was denied. By the California courts assuming, rather than requiring proof of a conspiracy, due process is violated. (*Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790.) This fiction of a concession is as prejudicial a violation of constitutional rights as permitting into evidence a false confession.

III. AS TO THE UNCONSTITUTIONAL APPLICATION OF 556 OF THE CALIFORNIA INSURANCE CODE: In the trial court, the Reporter's Transcript, page 1087, lines 13-23 relates:

"The Court: Is there any legal cause why judgment should not now be pronounced?

Mr. Cantillon: Yes, if your Honor pleases. At this particular time, we want to object to the pronouncement of judgment on the ground that the defendant has been denied due process of law as guaranteed to him by the Federal and State Constitutions, in that he has been denied due notice of the offense on which he has been convicted. He was prosecuted for the crime of a felony of filing a false claim on a contract of insurance and convicted of a felony of a false claim on a claim for a tort. That is my only objection, Your Honor.

The Court: Very good. The objection is overruled."

The point was raised before all the appellate courts and rejected. (Op. Br., Point VI, pp. 83-86; Pet. for Hear., Cal. S. Ct., Point III, pp. 25-31.)

IV. AS TO THE ILLEGAL SEARCH AND SEIZURE: This point related to the introduction into evidence of recordings of conversations with petitioner and agents of the prosecutor's office made surreptitiously after fraudulent entry on the premises of petitioner. This point was raised at the trial by objection under the state and federal constitutions and rejected. [R. T. pp. 335-344; 542-560; 716.] It was also raised before the appellate courts and was likewise denied or ignored. In the District Court of Appeal, the Opening Brief contains Assignment of Error No. VII on this point. (Pp. 80-90.) In the Supreme Court of California, the Petition for Hearing contains Point IV on this matter. (Pp. 31-34.)

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF WRIT.

I.

The California Courts Have Denied Petitioner Due Process of Law Under the Federal Constitution in Holding That He Has No Standing to Rely on the Defense of Entrapment Because He Refused to Admit the Commission of the Offense Charged.

Petitioner has raised the defense of entrapment by misrepresentation of the agents of the District Attorney's Office in all the California Courts. Because he has denied the commission of the offense charged, all the California Courts have denied him standing to rely on the defense of entrapment. The opinion of the California District Court of Appeal, which sets forth the law of petitioner's case, states:

> *"The invocation of the defense necessarily assumes that the act charged as public offense was committed . . .* Under the circumstances, we need not discuss the additional claims (although neither is tenable) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law." (See Appendix A, pp. 17-18.)

The circumstances referred to were, of course, that petitioner had consistently denied the commission of the offenses charged.

The California Supreme Court denied his petition for a hearing of his appeal without opinion. The law of California, stated in *People v. Wilburn*, 49 Cal. 2d 714, 321 P. 2d 452 presumes that the trial court applied the law pronounced by the appellate court at the trial of appellant's case.

The law applied to petitioner's case by the California Courts conditions the raising of a defense. This issue presented is this: Is it consistent with due process that State law make an election of defenses for an accused? Where, as here, petitioner pursuant to rights guaranteed under the Fifth and Fourteenth Amendments required the state to prove each element of the offense charged, is it consistent with due process for the state to thereby deny petitioner standing to raise the defense of entrapment? The problem is stated in an article appearing in *73 Harvard Law Review* 1333 at page 1343 as follows:

> "But forcing admission of the elements of the offense . . . conditions the defense of entrapment upon waiver of the defendant's right to have the elements of the crime proved beyond a reasonable doubt."

In *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the problem was similar. There a procedural requirement denied defendant standing to raise the issue that the contraband evidence the prosecution sought to introduce against him was illegally obtained unless he claimed a proprietary interest in the contraband. The imposition of such a condition was held a denials of due process. *Hansford v. United States*, 303 F. 2d 219, raised the issue of the instant case in a federal prosecution. It was there decided that federal due process required that the court give the accused standing to raise the defense of illegal entrapment although the accused denied the commission of the offense charged.

The instant case asks: May state courts apply different standards of due process than those this court decides apply to criminal prosecutions in federal courts? This point is also raised in *Ker v. California*, Docket No. 53, certiorari granted, October Term, 1962.

Petitioner urges that denial of standing to rely on the defense of illegal entrapment prevents a fair trial because the defense involves a consideration of the intent of the defendant and a consideration of the abuse of public power in relation to the state's citizens.

A conviction obtained by persuasion to commit the crime or, *as in the instant case, by deception*, is as objectionable as those obtained by coerced confessions and illegal search and seizure. *Sherman v. United States*, 356 U. S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 1081, classifies all of these methods as denials of due process. *Raley v. Ohio*, 360 U. S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344, involved a conviction obtained by misrepresentation of public officers resulting in the commission of the acts complained of. Such conduct by a state was held to amount to a denial of due process of law.

In petitioner's case the evidence showed that he was misled by representations of agents of the District Attorney's office to file fraudulent documents supporting a spurious liability insurance claim of one of these agents against another.

Time after time, representation was made to petitioner that the agents were injured and were under medical treatment.

The record also shows that one of the agents gave evasive answers to petitioner at a time when a truthful

response to petitioner's inquiry would have prevented petitioner doing the acts charged.

The agents were informed by one of petitioner's co-defendants, who prepared the fraudulent document petitioner later filed, in effect that "Benson doesn't know anything about it."

Petitioner had told one of the agents in effect; "If this is a fraud, I don't want anything to do with it." Nevertheless, the agent evaded petitioner's inquiry and encouraged petitioner to prosecute the claim. The other agent actually filed an injury report with the state motor vehicle department.

The California courts relied throughout on their finding of conspiracy between petitioner and his co-defendants to find criminal intent on the part of petitioner, yet denied him standing to raise the defense of entrapment by misrepresentation which would have involved the issue of his good faith and intent.

The trial court failed to consider that the agent who filed the injury report with the state motor vehicle department was estopped to testify he had not been injured. This same point arose in *Rosen v. Board of Regents*, 16 A. D. 2d 531, 230 N. Y. S. 2d 166, where the court held such contradictory conduct was unfair to the accused.

Not only did the court attribute to petitioner the intent of others by its finding of conspiracy, but he was denied standing to refute that he shared their intent.

II.

The California District Court of Appeal Has Denied Petitioner Due Process of Law Because It Based Its Affirmance of Conviction on Its Finding That Petitioner Made a Concession That a Prima Facie Case of Conspiracy Existed When in Fact No Such Concession Was Ever Made.

The opinion of the District Court of Appeal states:

> "... he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his co-conspirators outside his presence would be admissible." (Appendix, p. 16.)

By this "boot strap" reasoning the court found petitioner's criminal intent in the extra-judicial statements of his co-defendants. The prejudicial nature of this illogic was pointed out by this court in *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790 as follows:

> "In other words a conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed."

The other pronouncement of the District Court of Appeal on the subject of petitioner's intent was that petitioner lacked

> "a cautious concern for the true facts which is expected of an attorney with fourteen years in the practice. . . ." (Appendix, p. 14.)

The court cites no case basing a finding of conspiracy upon negligent conduct. It was, however, the law ap-

plied to petitioner's case. The law of California (*People v. Wilburn*, 49 Cal. 2d 714, 321 P. 2d 452) presumes that the trial court applied the same rules of law as applied by the appellate courts.

The concession the District Court of Appeal makes on behalf of petitioner is completely unwarranted by anything in petitioner's briefs or the trial record. Petitioner sought a rehearing before the District Court of Appeal on this very point. His petition for rehearing sought to demonstrate the court's error of facts pointing out that the issue of *prima facie* proof of conspiracy was argued throughout petitioner's briefs on appeal and that objection was made to the admission of all of the alleged extra-judicial statements of co-defendants. Throughout, petitioner's major point was that the record was devoid of evidence to support a finding of intent to participate in a criminal scheme and that admission into evidence of fifteen hearsay conversations transferred to petitioner the criminal intent of others.

The position of the District Court of Appeal asserting that petitioner conceded *prima facie* proof of conspiracy, is inconsistent with their position on the issue of entrapment. On that issue petitioner was denied standing to rely on the defense of entrapment because he did not admit the commission of the offense. On this issue affirmance of conviction is based on the fiction that petitioner conceded its *prima facie* proof.

III.

The California Courts Have Denied Petitioner Due Process and Equal Protection of the Law by Applying a Construction of a Phrase of a State Criminal Statute to Petitioner Contrary to the Construction of the Same Phrase in Prior Civil Cases.

The full text of Section 556 of the California Insurance Code is set forth under the heading of this petition: "Constitutional provisions and statutes involved in the case."

Because "claims . . . under a contract of insurance" have never previously been considered to include tort claims, the application to petitioner of this statute denied him due process and equal protection of the law.

All of the acts petitioner did related to tort claims against drivers of automobiles who allegedly had collided with Buchholz and Meng. There was no evidence that petitioner's "clients" had a claim under a contract. In the past California appellate courts (*Olds v. General Accident*, 67 Cal. App. 2d 812, 155 P. 2d 676) have taken the position that no claim based on tort could arise against an automobile public liability insurance company until a judgment was first obtained against the policyholder. In *People v. Learman*, 281 A. D. 583, 121 N. Y. S. 2d 388, the New York court construing New York's statute worded similarly to Section 556 held its statute was inapplicable to tort claims.

The particular prejudice to petitioner resulted when the court extended this statute to a new field of activity. The court here contradicted its construction of the same words "claims under a contract of insurance" it adopted in *Olds v. Gen. Acc., supra*, in order to support petitioner's conviction. Neither the California Supreme Court nor the District Court of Appeal had rejected the construction of *Olds* since that decision.

The question for the trial court here should have been: Was there any evidence that a claim was made under a contract of insurance? Since there wasn't any evidence, the trial court's findings on all three counts were erroneous. The District Court of Appeal's expanded construction of Section 556 violated petitioner's rights under the Federal Due Process and Equal Protection Clauses because the state law in effect at the time of the petitioner's trial was not applied to him.

Garner v. Louisiana, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207, involving a state disturbing the peace statute, presented a similar problem. The evidence before the trial court showed non-violent conduct. The Louisiana appellate precedent was that this statute was inapplicable to such conduct. The Louisiana appellate court affirmed Garner's conviction, without specific reference to rejecting the prior precedent. On appeal to this court, the state took the position that the Louisiana court had construed the statute to include non-violent conduct. Such a change of position after the act complained of had occurred was held to deny Garner his federal due process rights.

IV.

It Is a Violation of the Petitioner's Rights Under the Fourteenth Amendment, Where the Prosecutor's Agents Obtained Entry by Misrepresentations Into the Private Office of the Petitioner, for the California Trial Court to Admit Into Evidence a Recording of Conversations of the Prosecutor's Agents With the Petitioner Which the Agents Surreptitiously Obtained While in the Petitioner's Office and to Admit the Testimony of the Agents as to the Conversations Where Objection Was Duly Made on Said Constitutional Grounds.

As stated by the opinion of the District Court of Appeal the recordings of conversations made in petitioner's office by two agents of the prosecutor constituted "much of the People's case against Benson" (Appendix, p. 4.)

Objection was made at trial to admission of all the conversations recorded in petitioner's office and petitioner has urged at all stages of the trial and appellate proceedings that this evidence was obtained in violation of his rights secured by the Fourth and Fourteenth Amendments of the United States Constitution.

The trial record showed testimony by two agents of the District Attorney's Office that each of them represented to a co-defendant of petitioner (Dr. Matloff) that they (the agents) had been in rear-end automobile accidents. In one instance no collision had, in fact, occurred.

Petitioner did not solicit either agent to enter his office or become his client. Instead each of the agents telephoned petitioner requesting representation in their

prosecution of personal injury claims. The attorney-client relationship with its implied invitation to enter petitioner's office was created in the case of each agent when petitioner sent an attorney-employee to their homes. Contingent fee agreements were there signed. Misrepresentation as to the existence of a personal injury in the case of one agent (this was the agent that filed an accident report claiming injury with the California Department of Motor Vehicles) and misrepresentation of the fact of collision and existence of personal injury in the case of the other agent thus paved the way for later entry into petitioner's office.

None of the evidence gathered by recording was incident to the petitioner's arrest which occurred months afterwards. No probable cause existed at the time the recordings were made for it has been the argument of the District Court of Appeal that it was the recordings that connected petitioner with the co-defendants. The agents had neither search warrants nor warrants to arrest petitioner when they made the recordings.

The issue here presented is that which was considered by this court in *Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 848 and *Gouled v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. Does it make a difference in invoking rights under the Fourth and Fourteenth Amendments of the United States Constitution that the entry that permitted the gathering of evidence inside a defendant's premises is by deception rather than by force? Does it make a difference that the evidence obtained was heard rather than seized?

The *Silverman* case points out that attention should be focused on how the evidence was obtained rather

than what was obtained. The *Gouled* case points out that entry gained by deception equals entry gained by force in its effect on defendant's constitutional rights. The case of *Fraternal Order of Eagles v. United States*, 57 F. 2d 93 involves an unlawful entry by means of a misrepresentation similar to that made by the prosecution's agents in the instant case. In that case, the agents entered representing that they were members of the lodge.

The point raised here is also raised by a recent case granted certiorari. *Lopez v. United States*, Docket No. 236, October Term, 1962.

The agents' representations that they were injured in auto accidents had two effects. First, they caused attorney-client relationships to be created which implied permission to enter petitioner's office. Second, they caused petitioner to present the medical reports. The court's position that petitioner had no standing to show the misrepresentations misled him, apparently led the District Court of Appeal to the conclusion that the entry into petitioner's office was not unlawful, for the opinion states:

> "Appellant's final point is that there was an unreasonable search and seizure. He charges that Buchholz and Meng acted as 'decoys' and that the various recordings obtained by use of the minifphone were inadmissible. There is merit to neither claim. See *People v. Wojahn*, 169 Cal. App. 2d 135, 142 (recorded conversations); *People v. Lagomarsino*, 97 Cal. App. 2d 92, 97 (decoys)." (Appendix, p. 20.)

In *People v. Wojahn*, the doctor invited the patient into his office. There was no misrepresentation of fact, but only concealment of a recording device. *Lagomarsino* involves propriety of the use of a feigned accomplice; no entry into private premises is involved.

The entrenching of the prosecutor's agents in the office of petitioner by misrepresentation and for the purpose of illegal entrapment is an invasion of petitioner's privacy under the Fourth and Fourteenth Amendments. Evidence ought to have been excluded by the trial court for both of these reasons. But it was received to petitioner's prejudice, the court erroneously reasoning that the foreclosing of the issue of entrapment by misrepresentation had the effect of foreclosing the issue that evidence had been illegally obtained.

Conclusion.

For the foregoing reasons, it is submitted that this Petition for Certiorari should be granted to review the decision of the District Court of Appeal of the State of California.

Respectfully submitted,

RALPH R. BENSON,
Petitioner, Pro Se.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, vs. Ralph R. Benson, Defendant and Appellant. Criminal No. 7704.

Filed Aug. 6, 1962.

Appeal from a judgment of the Superior Court of Los Angeles County. Frederick W. Mahl, Jr., Judge.

Cantillon & Cantillon, Richard H. Cantillon for appellant.

Stanley Mosk, Attorney General; William E. James, Assistant Attorney General; William B. McKesson, District Attorney; Harry Wood and Harry B. Sondheim, Deputy District Attorneys.

Benson, Isaac Matloff and Edwin T. Harder were charged by information with conspiracy to commit grand theft and to violate section 556[1] of the Insurance Code (count I), in count II with a violation of section 556, *supra*, on or about March 10, 1960, and in count III with another violation of section 556 on or about April 28, 1960. After the commencement of trial to a jury, Matloff and Harder entered guilty

[1]Section 556 of the Insurance Code: "It is unlawful to: (a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. (b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim. Every person who violates any provision of the section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

pleas to attempt to violate section 556. Trial without a jury was then continued as to Benson only; he was adjudged guilty on all three counts. The appeal is from the judgment (order granting probation) and the order denying a new trial.

Benson is an attorney; Matloff, a chiropractor, and Harder, an osteopath. On December 11, 1959, one Buchholz was involved in a rear-end collision. He sustained no personal injuries, although one Orr became liable to Buchholz for property damage to Buchholz' car. Three days later Matloff came to Buchholz' home; he was referred to Buchholz by an employee of the agency where the car was taken for repairs. The employee had been promised $25 by Matloff for every rear-end collision case referred to him. Matloff told Buchholz, whom he had never previously met, that the latter "could make some money on this accident because it was a rear-end collision, and if I (he) would say I (he) had a whiplash, that there would be no way to prove otherwise." Buchholz was also told that Benson would be the attorney handling the case and that he would be contacted by Benson within a few days. Buchholz advised Matloff that he would think it over. Two days after Matloff's visit, a Mr. Potter from Benson's office called at Buchholz' home. He filled out some papers and asked Buchholz to sign them; Buchholz said he wanted to "sleep on it" before employing Benson. Buchholz then went to the police who, in turn, contacted the District Attorney's office; Buchholz was told to play along — or, in effect, to act as a decoy. Potter paid Buchholz a second visit about a week later. Buchholz signed certain papers and explained how the accident happened. Thereafter, Mat-

loff came to Buchholz' house on six or seven occasions; only one treatment was given, however. Buchholz told Matloff that he was not hurt; but Matloff stated that the bigger his (Matloff's) bill, the bigger would be Buchholz' recovery. Benson admits that the medical bills and reports as to Buchholz were "undeniably false." One such bill stated that Buchholz had been given 20 treatments. It was forwarded by Benson on March 10, 1960, to Orr's insurance carrier. After the company requested an itemized bill, on March 23, a more detailed bill was forwarded by Benson — it made reference to various dates when Buchholz had been assertedly treated by Matloff.

On March 4, 1960, Buchholz took Robert Meng, an investigator from the District Attorney's office, to see Matloff. Posing as a person who had been recently involved in a rear-end collision with one Hawkins, although such was not the fact, Meng told Matloff that he had not been injured; Buchholz had previously advised him, however, that he (Meng) might make some money and Matloff agreed. In this regard, Matloff stated: "You are always injured in a rear-end collision. You get a whiplash." When mention was made of getting an additional doctor, Matloff said that he and Harder had been working with Benson for quite some time; that Harder would give the same diagnosis after he had seen Matloff's report. Matloff took some X-rays; he then telephoned Benson who talked to Meng. Benson asked Meng if he was working; when Meng said "No," Benson said, "You were working." Meng replied, "Well, okay." Meng was afterwards seen by Harder. As in the instance of Buchholz, Benson now admits that Matloff and Harder submitted false re-

ports for service rendered Meng. These bills and reports were forwarded by Benson to the Insurance carrier for Hawkins.

Although not specifically charged in the information, evidence was introduced (apparently without objection) that Benson had forwarded to still another insurance carrier a false report of Dr. Harder pertaining to one Villabisencio. It appears that Villabisencio received a bill from Harder for 14 visits, whereas the latter had seen Villabisencio not more than 5 times. When Villabisencio telephoned Benson about the matter, Benson said: "Well, you sign it, I am your attorney, and if I tell you to sign it, you sign it; don't sign anything else unless I tell you." Villabisencio signed the bill; subsequently Benson submitted to the insurance company a bill similar to that signed by the client.

Much of the People's case against Benson consisted of certain recorded conversations he had with Buchholz and Meng. On January 14, 1960, Buchholz went to Benson's office on order of the District Attorney's office; prior thereto a miniphone was installed on his person. Benson told Buchholz that he was in touch with California Casualty, the insurance carrier for Orr, and that he would also be in touch with Matloff. Buchholz testified that in response to Benson's question he told appellant that he was not hurt.[2] In February or March Buchholz had another conversation

[2]When the tape recording was played to Benson, then under cross-examination, Buchholz was heard to say: "You know, there is nothing wrong with me, I don't want to get into any trouble." Asked if his memory was refreshed that Buchholz made such a statement, Benson replied: "Yes, he did." The recording was admitted into evidence without objection.

with Benson, this time by telephone, wherein he told Benson that his neck and back were not injured.

On March 25 Meng telephoned Benson. The conversation was recorded, the transcription thereof being as follows:

"Office Girl: Hello, Mr. Benson's office.

"Mr. Meng: May I speak to Mr. Benson, please?

"Office Girl: Who is calling?

"Mr. Meng: This is Bob Meng.

"Office Girl: Bob Meng?

"Mr. Meng: Meng, M-e-n-g.

"Office Girl: Do you want to know when your case is coming on?

"Mr. Meng: No. I'd like to discuss something with him if I could.

"Office Girl: This isn't regarding a case, though, is it?

"Mr. Meng: Yes, it is.

"Office Girl: Will you hold the line a second, please.

"Mr. Meng: All right.

"Mr. Benson: Hello, Bob.

"Mr. Meng: Yes.

"Mr. Benson: Ralph Benson.

"Mr. Meng: Yeah; how are you?

"Mr. Benson: Okay.

"Mr. Meng: Listen, I got a phone call last night from this fellow Hawkins, the guy that hit me—

"Mr. Benson: Yeah, he's out of his mind.

"Mr. Meng: (Laughing)

"Mr. Benson: He's out of his mind.

"Mr. Meng: Well, what do you say —

"Mr. Benson: He wants to settle this for very little money.

"Mr. Meng: Uh-huh.

"Mr. Benson: Did he mention any money to you?

"Mr. Meng: No, he didn't, but he was —

"Mr. Benson: So that his company wouldn't be bothered.

"Mr. Meng: Well, he seems kind of shook up about it, and he's got me a little bit shook up because —

"Mr. Benson: Why — why should it shake you up?

"Mr. Meng: Well, see — you have talked to Matloff or Harder about this thing?

"Mr. Benson: Why?

"Mr. Meng: Well, I told them — you know I wasn't hurt actually, and I told Harris[3] that night— the night that he came out to my house —.

"Mr. Benson: That's all right.

"Mr. Meng: Well —

"Mr. Benson: That's no problem.

"Mr. Meng: Well, what do you mean it's no problem, I mean, suppose I have to go to court with this guy, or something?

"Mr. Benson: I tell you what — you're upset.

"Mr. Meng: Huh?

"Mr. Benson: You sound like a girl who has just found out she's pregnant.

"Mr. Meng: Well — (laughing) can you, — I mean, you see my point, in other words —

"Br. Benson: I see your point. I've been a lawyer 14 years, I can see your point.

"Mr. Meng: Well —

"Mr. Benson: Just forget it.

"

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[3]Harris is an attorney, employed at that time by Benson.

"Mr. Meng: Well —

"Mr. Benson: Look, I'll take care of it. I mean, this case can be settled for around $1500.

"Mr. Meng: Uh-huh.

"Mr. Benson: If you — if you want to feel that's not enough — that's too much money for you — this guy — other guy will probably give you $200 to forget it.

"Mr. Meng: Uh-huh. Well, whatever you say, you're the boss; but I wanted to talk to you about the case, as I say —

"Mr. Benson: All right. * * * from work?

"Mr. Meng: Huh?

"Mr. Benson: You lost any time from work?

"Mr. Meng: Did I loose any time from work?

"Mr. Benson: Yeah.

"Mr. Meng: No, see, I told Joe Harris that night, see, I wasn't work — huh?

"Mr. Benson: That's okay. Now, look don't worry about this. Just don't talk to anybody but me and Dr. Matloff, and quit talking to the other guy.

"Mr. Meng: Okay, you're the boss, whatever you say.

"Mr. Benson: Okay?

"Mr. Meng: Okay.

"Mr. Benson: I'll be in touch with you.

"Mr. Meng: Righto.

"Mr. Benson: Good-bye.

"Mr. Meng: Good-bye."

On April 18 Matloff signed a medical report pertaining to Meng. Various questions in the report were answered falsely — these false answers, according to Meng, he did not furnish to Matloff. The next day,

pursuant to Matloff's suggestion, Meng took one or two copies of this report to Benson's office. At that time he had a conversation (likewise recorded) with the appellant who, while under direct examination, read its transcription into evidence:

"Mr. Meng: Well, listen, you undoubtedly talked to Joe Harris about this. Like I said Matloff called me and asked me to come out and fill this thing out with him, which is fine, except he has changed a few things on it, and that's fine as long as I don't have to go to court, but, . . ., he's got nothing but a bunch of lies on that thing.

"Mr. Benson: Where are his lies?

"Mr. Meng: Well, to begin with, he's got a different date on there as to the date that Joe came out to see me, and Joe came out the same day that I saw him for the first time.

"Mr. Benson: Makes it seem though you didn't.

"Mr. Meng: Right.

"Mr. Benson: What's the date?

"Mr. Meng: I don't remember exactly.

"Mr. Benson: Did you go to the doctor the next day?

"Mr. Meng: No, I didn't.

"Mr. Benson: Well, that's something you and the doctor must decide between yourselves in matters of your own conscience.

"Mr. Meng: Well, as I say, everything's fine as long as I don't have to go to court because . . . . that's all I got to do is get court *(sic)* in a lie or something and I'd spend ten years in jail."

"Mr. Benson: Well, I don't know how many times you have seen him. I wasn't there. Whatever it is, it

is, and I go by and submit to the company whatever is said to me by the doctor. If you feel this is a lie, we'll drop the whole case right now."

"Mr. Meng: Well, I —

"(then Mr. Benson says something unintelligible.)

"This thing is dropped.

"Mr. Meng: Whatever you think, as I say I don't know, like I told Joe the night he came out to fill out this accident form, or whatever the heck it is, I told him then the same thing I told Matloff, that I wasn't actually hurt in the thing.

"He said: 'Well, don't talk to me. Talk to Matloff and Mr. Benson.'

"And I said, 'All right,' and when I talked to you on the phone —

"Mr. Benson: I am not going to participate in a fraud. If this is a correct — if you and the doctor say this is correct, I'll go along with you. If you say it is incorrect —

"Mr. Meng: Well, as I say —

"Mr. Benson: I am not going to participate in a fraud. I never had for 14 years and I don't intend to.

"Mr. Meng: Fine. (and then something unintelligible)

"Mr. Benson: If you say this is untrue, let's forget the whole thing. You figure it out for yourself.

"Mr. Meng: I don't know.

"Mr. Benson: What's your age?

"Mr. Meng: Thirty-five.

"Mr. Benson: Thirty-five and you haven't learned anything about life yet.

"Mr. Meng: Haven't learned anything about life?

"Mr. Benson: Yeah, life.

"Mr. Meng: Yeah, I learned something about life.

"Mr. Benson: All right. Did you get a third copy of this?

"Mr. Meng: No. He said he wanted to keep one copy and send one copy to Dr. Harder.

"Mr. Benson: It's all right.

"Mr. Meng: Yeah, everything was fine until this guy Hawkins called me up and then —

"Mr. Benson: Who's Hawkins?

"Mr. Meng: That's the guy that hit me.

"Mr. Benson: What did he say?

"Mr. Meng: He wanted to know what the heck I was doing and I said, 'What do you mean, what am I doing?' And he said, 'Well, I got a letter from my insurance company saying that somebody's filing suit against me,' and I said, 'Buddy, I don't know what you're talking about.' Remember I called you and told you he called me?

"Mr. Benson: Yeah. So what? Hawkins is not supposed to call you.

"Mr. Meng: Huh?

"Mr. Benson: Hawkins is not supposed to call you.

"Mr. Meng: Well, as I say, I've never had that happen to me before and I didn't know what was going on.

"Mr. Benson: At the time of this collision you were unemployed and looking for work.

"Mr Meng: Right.

"Mr. Benson: You earned about $150.00 a month.

"Mr. Meng: $150.00 a week.

"Mr. Benson: A week.

"Mr. Benson: When did you finally get back to work?

"Mr. Meng: About two and a half weeks. February 18th.

"Mr. Meng: I haven't actually, I've had a few odd jobs, —

"The Witness: (Reading)

"My wife is still working, thank God, but I've only had a couple of odd jobs.

"Mr. Benson: How many children do you have?

"Mr. Meng: Beg pardon?

"Mr. Benson: How many children?

"Mr. Meng: Two. Boy and a girl.

"Mr. Benson: When was the first time you went back to work after February 18th.

"Mr. Meng: About three weeks ago. I had a job for four days.

"Mr. Benson: What day did it start?

"Mr. Meng: Beg pardon?

"Mr. Benson: What day did it commence?

"Mr. Meng: Have you got a calendar?

"Mr. Benson: Right.

"Mr. Meng: Well, let's see. Today is the — what's today? The 19th.

"Mr. Benson: Well, they've got you down for one week so I'll have to turn it in. Well okay as soon as I get the report from Dr. Harder I'll submit a copy to you and give a copy to the company and we'll have this case settled.

"Mr. Meng: All right. Will you get in touch with me then?

"Mr. Benson: Okay.

"Mr. Meng: Do you want me to call you or what?

"Mr. Benson: No. I'll be in touch with you. I've got your number.

"Mr. Meng: Well, as I say I'm not adverse to making a buck, but you know.

"Mr. Benson: Yeah.

"Mr. Meng: As long as I don't have to go to court, I don't care.

"Mr. Benson: Okay.

"Mr. Meng: Okay, thanks very much."

On April 28, Benson mailed to Hawkins' insurance company Matloff's report, testified to by Meng, and a report from Harder. Matloff's report included the following answers to the following questions: "How many times have you treated the patient? 26 times. What is the precise location, nature and extent of the injury as revealed by your examination? Occipital headache, neck tension, sacroiliac tension. What is the period of time patient has been confined at home or in hospital? One week."

Benson testified on his own behalf. He stated that he relied upon the medical reports and oral information furnished him by his clients' doctors. The ultimate issue for determination, therefore, was appellant's knowledge or lack of knowledge of the falsity of the Matloff and Harder reports. He challenges the adverse finding in this regard; we now take up this first assignment of error.

Although appellant concedes that the resolution of conflicting inferences is for the trier of fact, he now asks this court to say that as a matter of law an inference of guilt cannot be drawn from the evidence adduced. That being so, he further contends, "the ele-

ment of wilfulness essential to each offense is totally lacking."[4] Furthermore, he says the conversations out of his presence between Buchholz, Meng, Matloff and Harder were inadmissible since the existence of a conspiracy cannot be inferred unless appellant had the required knowledge of the falsity of the claims; on the other hand, it is conceded, the existence of a conspiracy can be inferred if appellant had such required knowledge.

It has been stated that in prosecutions for violating section 550 of the Insurance Code, "The basis of the ~~offense~~ alleged is the defendant's intent to defraud . . ." (*People v. Turley*, 119 Cal. App. 2d 632, 636.) A person who knowingly or wilfully submits a claim, knowing it to be false, necessarily does so to defraud. (*People v. Haydon*, 106 Cal. App. 2d 105.) Generally, "Whether (a defendant) made these representations in good faith or whether he made them knowing they were false, or in reckless disregard of the truth and without information justifying the belief, (are) questions for the (trial court)." Intent cannot always be proved by direct evidence. Many times it has to be determined from a consideration of all the circumstances surrounding the doing of an act . . . An intention to defraud is an essential element of the charged offenses, but such intention is inferable from all the facts of the case and need not be substantively proved . . ." (*People v. Henderson*, 79 Cal. App. 2d 94, 117-118.) See also *People v. Burnham*, 194 Cal. App.

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[4] "The word 'wilfully' as used in criminal statutes implies a purpose or willingness to commit the act (Pen. Code, Sec. 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing and is a free agent." (*In re Trombley*, 31 Cal. 2d 801, 807.)

2d 836, 841-842; *People v. Proctor*, 169 Cal. App. 2d 269, 279.) Although his counsel has extensively argued that appellant's case is in effect *sui generis*, we are satisfied that the present point is governed by the familiar rules stated above. It has been said countless times, and was rather recently reiterated by the Supreme Court, that, "The choice of which inference is to be drawn from the facts, where more than one reasonable inference is possible, is the function of the jury." *(People v. Sweeney*, 55 Cal. 2d 27, 51.) That the challenged inference of actionable knowledge or scienter and reckless disregard of the truth was reasonably drawn is clear from the following facts.

With respect to the Buchholz transactions, Benson was advised on two separate occasions that Buchholz was not injured. Thus, on January 14 (the recorded conversation), Buchholz told appellant that he was not hurt or injured. Again, in February or March, Buchholz telephoned appellant and stated that his neck and back were not injured. Notwithstanding these unequivocal statements, appellant shortly thereafter forwarded the medical reports to the responsible insurance carrier; such action belies a cautious concern for the true facts which is expected of an attorney with 14 years in the practice, most of which practice (appellant stated) was in this particular field. A different picture is portrayed in appellant's briefs, wherein he points to several asserted discrepancies in the Buchholz testimony, recorded and otherwise; other arguments are directed toward the lack of credence to be accorded this witness. Despite a painstaking effort in this regard, all these arguments were for resolution by the trier of fact. Appellant's testimony, on the other hand, re-

flects more than mere discrepancies; it contains an outright contradiction, upon cross-examination, of what he testified to while under direct examination. (See footnote 2 herein.) When false testimony is thus given, it is evidence of consciousness of guilt from which, along with other evidence, a determination of guilt may be inferred. (*People v. Wayne*, 41 Cal. 2d 814, 823.) Indeed the inference in question does, and should, carry more weight when the false testimony comes from the lips of an attorney; this, despite appellant's claim that there was no "intentional falsity." The area of interrogation related to pivotal points in the case and not minor or incidental matters.

With respect to the Meng transaction, again Benson was twice informed of the true facts. On March 25, Meng advised appellant by telephone that he "wasn't hurt actually," and Benson replied, "That's all right." Though thus previously advised, Benson in the same conversation later said: "That's no problem," "just forget it," and "look I'll take care of it." The entire conversation has heretofore been quoted; considered as a whole, it supports the trial court's implied conclusion that appellant had little concern for his responsibilities in the premises and was determined, recklessly or fraudulently, to proceed forthwith with the processing of his client's claim. Meng again informed Benson of the falsity of his claim at appellant's office on April 19 — this conversation has also been heretofore quoted *in toto*. Meng told appellant that Matloff's report contained "nothing but a bunch of lies" which, of itself, warranted some restraint on appellant's part; the report, devoid of any changes, was nevertheless mailed to the responsible insurance company. It is, of

course, true that in the course of this conversation Benson told Meng that he "was not going to participate in a fraud, . . . never had for 14 years . . . don't intend to." He also stated: "Well that's something you and a doctor must decide between yourselves in matters of your own conscience." A scrupulous concern for his duties as an attorney would have dictated that appellant not thus stand aside and let others determine where the truth lay; certainly appellant's position, thus revealed, seems out of harmony with his statutory duty, "To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth . . ." (Bus. & Prof. Code, Sec. 6068(d)). Situations will arise where there is an *honest* difference of opinion, but this is not such a case.

As noted earlier, appellant concedes that the existence of a conspiracy can be inferred if the evidence shows that he had the knowledge requisite to the commission of the substantive offenses; he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his coconspirators outside his presence would be admissible. (*People v. Robinson*, 43 Cal. 2d 132, 137.) These statements we briefly refer to. On February 5, Matloff told Buchholz: "Well, you see, the point is the insurance doesn't know what shape you're in, and talk about Benson, he doesn't care whether you're in bed or out of bed. It wouldn't make any difference." On March 4, Matloff told Meng that he and Harder had been working with Benson "for quite some time"; that Harder would see his X-rays and give the same diagnosis. On March 22, Meng

advised Harder that neither he nor Buchholz had been injured in any accident. Harder then told Meng not to worry about it because Benson would see to it that neither of them would have to go to court; he also told Meng that he had been working with Benson "for about three years." On March 23, Meng told Matloff that Harder had not examined either Buchholz or himself; Matloff replied that it didn't make any difference because Harder had worked with him and Benson and knew what to do. This and other evidence, unnecessary to relate, clearly show a corrupt agreement among the parties concerned (accompanied by overt acts) to commit the substantive offenses charged; that is the gist of the crime of conspiracy.

As his next assignment of error, appellant contends that he was entrapped; he does so notwithstanding his consistent denial that the crimes complained of were committed. His position is similar to that of the appellant in *People v. Lee*, 9 Cal. App. 2d 99, where Lee denied that any sale of contraband was made or that he had any narcotics in his possession, but still argued entrapment. At pages 109, 110, the court there said: "It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. *The invocation of the defense necessarily assumes that the act charged as public offense was committed.*" (Emphasis added.) The holding in *Lee* was followed in *People v. Gelardi*, 77 Cal. App. 2d 467, 477, which quotes the language of the court above emphasized; the Supreme Court without a dissenting vote thereafter denied a hearing in *Gelardi*. Later cases in accord in-

clude *People v. Polsalski,* 181 Cal. App. 2d 795. Appellant claims that the declaration in *Polsalski* with reference to entrapment is dictum; dictum or otherwise, the law seems clear that appellant's position is inconsistent, and furthermore no California case is cited in support of the present assignment. Under the circumstances, we need not discuss the additional claims (although neither is tenable) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law.

As his next contention, appellant argues he could not be convicted of violating section 550 of the Insurance Code because neither Buchholz nor Meng, as distinguished from a policyholder, had a contract of insurance with the companies to whom the claims were presented; this is not the first time such a contention has reached our reviewing courts. As provided in the statute (footnote 1), the false or fraudulent claim must be for the payment of a loss "under a contract of insurance." The claims of Buchholz and Meng, says appellant, were *ex delicto* and not *ex contractu,* particularly in the absence of evidence that the policies in question gave either of the supposedly injured persons direct rights inuring to his benefit. This later type of policy is encountered in *Connell v. Clark,* 88 Cal. App. 2d 941, and *Giordano v. Amer. Fid. & Cas. Co.,* 97 Cal. App. 2d 309, being written pursuant to the direction of statute or ordinance; there are also cases where the argument has been made that the contract of insurance was for the benefit of unnamed third persons. (See generally *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.,* 160 Cal. App. 2d 29.) Ordinarily, however, judgment must first be secured against

the insured before the injured person has a right of action against the insurer on the policy. (Ins. Code, Sec. 11580.)

It was pointed out earlier that the gravamen of the substantive offense is the defendant's intent to defraud. The Legislature realistically provided in the concluding paragraph of section 556 that "*Every* person who violates any provision of this section is punishable by imprisonment . . ." (Emphasis added.) In turn, we propose to be realistic in our interpretation of its coverage, particularly in the light of the circumstances at bar. It is a matter of common knowledge that insurance companies negotiate settlements directly with injured parties or their attorneys because of the liability of their insured. Benson testified that he sent letters to both companies, as well as their insured (Orr and Hawkins), stating that all communications respecting the claims should be sent to him directly. Benson was no neophyte in this area of practice — it represented, he stated, about 60% of his professional activities. The insurance companies subsequently dealt with appellant directly — in line with customary practice and pursuant to Benson's instructions.

Furthermore, appellant cites no California authority to sustain his position on the specific point in question save for a New York case (*People v. Learman*, 121 N. Y. S. 2d 388) the reasoning of which we are not obligated to follow. In California, however, there is precedent for the respondent's answer to the present ingenious argument. *People v. Grossman*, 28 Cal. App. 2d 193 (hearing by the Supreme Court denied) likewise involved a violation of section 556; it also involved a situation where there was no privity between

the defendants and the insurance carrier. The defendants included a doctor and a lawyer, and the conviction was affirmed even though the claim was made on behalf of a third party who had no rights under the contract of insurance alleged in the indictment. Only one defendant appealed. Said the court: "The defendant seems to contend that prosecution was bound to show that the contract of insurance . . . imposed liability upon the insurer. The first answer is that prosecution made the showing. The second answer is that the gravamen of the offense alleged was the defendant's intent to defraud. That intent did not depend solely on the legal obligation, if any, arising out of the said contract. (Citation.)" (p. 202) Rather recently in *People v. Reed,* 190 Cal. App. 2d 344, we had occasion to express our agreement with the treatment of the problem in *Grossman*; appellant has told us nothing which serves to change our views in that regard.

Appellant's final point is that there was an unreasonable search and seizure. He charges that Buchholz and Meng acted as "decoys" and that the various recordings obtained by use of the miniphone were inadmissible. There is merit to neither claim. See *People v. Wojahn,* 169 Cal. App. 2d 135, 142 (recorded conversations); *People v. Lagomarsino,* 97 Cal. App. 2d 92, 97 (decoys).

For the reasons stated the judgment (order granting probation) and the order denying a new trial are affirmed.

LILLIE, *J.*

We concur:

WOOD, *P. J.*

FOURT, *J.*

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IN THE

Supreme Court of the United States

October Term, 1962
No. 686

RALPH R. BENSON,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1962
No. .....

RALPH R. BENSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The Opinion of the District Court of Appeal, Second Appellate District, Division One, is reported as *People v. Benson*, 200 A. C. A. 608, and 23 Cal. Rptr. 908. The Opinion is also set forth as the Appendix to the Petition.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED.

The Petitioner contends that:

1. He was denied due process when the California Court held that he had no standing in the state court to rely on the defense of entrapment because he did not admit the commission of the crime.

2. He was denied due process because, he contends, the District Court erroneously stated that he conceded that a *prima facie* case of conspiracy existed.

3. He was denied due process and equal protection when, it is asserted, the state court construed a phrase in a state criminal statute contrary to the construction of the same phrase in prior civil cases, and

4. He was denied certain rights when state agents obtained entry into his office by misrepresentations and a recording of his conversations with the agents was obtained and testimony as to the conversations received at the trial over objection.

STATEMENT OF THE CASE AND OF FACTS.

In order not to further encumber the records of this Court, the People will rely upon the Statement of the Case and Statement of Facts set forth in the Respondent's Brief which was filed in the District Court of Appeal of the State of California and which has been transmitted to this Court. This summary appears on pages 1-44 of the Respondent's Brief.

ARGUMENT.

I.

There Was No Violation of Due Process.

Petitioner urges a violation of due process of law under the Federal Constitution in four separate instances. Respondent submits that none of the instances raised comes with the concept of due process as established by this Honorable Court. Due process has frequently been described as that which violates:

> "'the very essence of a scheme of ordered liberty' and its continuance would 'violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" (*Bute v. Illinois* (1948), 333 U. S. 640, 659, 92 L. Ed. 986, 997, and cases cited therein.)

Relative to the Due Process Clause as it applies to State criminal procedure, this court has stated:

> "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. . . . Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. . . ." (*Carter v. Illinois* (1946), 329 U. S. 173, 175, 91 L. ed 172, 175.)

Whether or not there has been a violation of due process depends upon a consideration of all of the circumstances involved in the particular case. Thus, in

Crooker v. California (1958), 357 U. S. 433, 2 L. ed. 2d 1448, 1453, 78 S. Ct. 1287:

> "It [the possibility of a violation of due process] is negated here by petitioner's age, intelligence, and education. While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the result of such a test would not be admissible at trial absent a stipulating by the parties. . . ."

In this matter, the petition alleges "The petitioner, Ralph R. Benson, is an attorney at law admitted into practice in 1947." (Pet. p. 4.) In its opinion, the District Court of Appeal made the following comment regarding the status of petitioner:

> "A scrupulous concern for his duties as an attorney would have dictated that appellant not thus stand aside and let others determine where the truth lay; certainly appellant's position, thus revealed seems out of harmony with his statutory duty, 'To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth. . . .' (Bus. & Prof. Code, Sec. 6068(d)). Situations will arise where there is an *honest* difference of opinion, but this is not such a case." (Appx. to Pet. p. 16.)

We now discuss, in the order set forth in the Petition, each of the four instances urged as a violation of due process.

II.

No Federal Question Is Raised With Respect to the Defense of Entrapment.

A. Introduction.

Petitioner's claim of entrapment has no semblance of merit whatsoever in light of the fact that petitioner's entire defense in the trial court was based upon his claim that he submitted the false claims of insurance without any knowledge of their falsity. Thus, there was no evidence whatsoever that petitioner was entrapped into doing an act with an evil intent because petitioner claimed he never had any evil intent. By petitioner's own story, the police in no way whatsoever induced him into committing a crime.

Furthermore, petitioner makes certain assertions with respect to the manner in which he was induced to represent the purported victims of automobile accidents which at least are misleading. The petition at page 18 states as follows:

> "Petitioner did not solicit either agent to enter his office or become his client. Instead each of the agents telephoned petitioner requesting representation in their prosecution of personal injury claims."

In fact it appears that in neither instance did either Buchholz or Meng (the alleged victims) solicit petitioner. Instead, in the case of Buchholz, Buchholz was contacted by Matloff, a co-defendant of petitioner

whom Buchholz had never previously met. Buchholz was told that Benson would be the attorney handling the case and was later contacted by a representative of Benson's office. In the case of Meng, Matloff called petitioner who then talked to Meng. See the opinion of the District Court of Appeal which is attached to the petition as Appendix A at page 2 and which sets forth the true manner in which Benson came to represent Buchholz and Meng.

B. The Defense of Entrapment Is Not a Constitutionally Protected Defense.

It appears that the defense of entrapment is an American innovation unknown at common law in England and is a defense which came into being in the late 19th century, long after the adoption of the Federal Constitution. See William E. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. L. R. 245-247. The principles of entrapment were created by the courts of the various states and the Federal courts not because of any constitutional compulsion, but rather as a judicial or statutory principle which those courts believed should be applicable in the trial of criminal cases.[1] Thus, this Court accepted the doctrine of entrapment as a state of facts which either the legislature had not intended to cover (see majority opinion

[1]However, Tennessee has rejected entrapment as a defense. *Roden v. State* (1961), 352 S. W. 2d 227. But see *Hajemaker v. State* (1961), 347 S. W. 2d 488, which is distinguished in *Roden v. State*.

in *Sorrells v. United States* (1932), 287 U. S. 435) for which the courts, in order to protect the purity of government and its processes, would not permit to be used as the basis for a conviction (see concurring opinion in *Sorrells v. United States, ibid* at 453). Neither the majority nor the concurring opinion in the *Sorrells* case premise their analysis on a constitutional basis.

The reasons why California adopted this doctrine are set forth as follows in *People v. Benford*, (1959), 53 Cal. 2d 1, 8-9:

> "In California recognition of the defense is said to rest upon the broadly stated ground of 'sound public policy' and 'good morals.' (*People v. Makowsky* (1935), 3 Cal. 2d 306, 309 [4] [44 P. 2d 536]; *People v. Gallagher* (1930), 107 Cal. App. 425, 529 [290 P. 504]; In re Moore (1924), 70 Cal. App. 483, 487 [6] [233 P. 805]; *People v. Barkdoll* (1918), 36 Cal. App. 25, 28 [171 P. 440].) The precise nature of this public policy has not been spelled out in any California majority opinion concerning entrapment, but obviously California has recognized the defense for reasons substantially similar to those which caused this court, in *People v. Cahan* (1955), 44 Cal. 2d 434, 445-446 [7] [282 P. 2d 905, 50 A.L.R. 2d 513], to adopt the rule that evidence obtained in violation of constitutional guaranties is not admissible; i.e. out of regard for its own dignity; and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judi-

cial enforcement of the criminal law, the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime. (See the concurring opinion of Justice Frankfurter in *Sherman v. United States* (1958), supra, 356 U. S. 369, 380; the minority opinion of Justice Roberts in *Sorrells v. United States* (1932), 287 U. S. 435, 454-455 [53 S. Ct. 210, 77 L. Ed. 413, 86 A.L.R. 249] [quoted with approval in the opinions of Presiding Justice Shinn adopted as dissents in *People v. Braddock* (1953), 41 Cal. 2d 794, 803 [264 P. 2d 521], and *People v. Terry* (1955), 44 Cal. 2d 371, 377 [282 P. 2d 19]]; and the dissenting opinion of Justice Brandeis in *Casey v. United States* (1928), 276 U. S. 413, 423 [48 S. Ct. 373, 72 L. Ed. 632].) Although there is an instinctive sympathy for the originally well-intended defendant who is seduced into crime by persuasion and artifice, such a defendant is just as guilty where his seducer is a police officer as he would be if he were persuaded by a hardened criminal accomplice. Entrapment is a defense not because the defendant is innocent but because, as stated by Justice Holmes (dissenting in *Olmstead v. United States* (1928), 277 U. S. 438, 470 [48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376], an illegally obtained evidence case), 'it [is] a less evil that some criminals should escape than that the Government should play an ignoble part.' (Frankfurter, J., concurring in *Sherman v. United States* (1958), *supra* p. 380 of 356 U.S.)."

C. The Rule That a Defendant Who Denies That the Act Charged as a Crime Was Not Committed Cannot Rely Upon the Defense of Entrapment Does Not Violate Due Process.

An annotation appearing in 61 A. L. R. 2d 677 contains a multitude of Federal and State cases which stand for the proposition that the defense of entrapment is not available to a defendant who denies that the act charged as a public offense was not committed, and some which hold that the defense is not available to one who denies that he committed the offense charged.

Petitioner states that in *Hansford v. United States* (1962), 303 F. 2d 219 it was decided "that federal due process required that the court give the accused standing to raise the defense of illegal entrapment although the accused denied the commission of the offense charged." (Pet. p. 11.) That case did not so decide, nor have we been able to find any authority for such a proposition.

D. Even if It Were a Denial of Due Process to Refuse the Defense of Entrapment Where a Defendant Denies That the Act Charged as a Crime Was Committed, the District Court of Appeal Held That the Facts of This Case Do Not Support the Defense of Entrapment.

It should be noted that the District Court of Appeal stated as follows with respect to the defense of entrapment:

> "Under the circumstances, we need not discuss the additional claims (*although neither is tenable*) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law." (See Appx. to Pet. p. 18; emphasis added to language appearing in parentheses.)

It is thus clear from this sentence that the District Court of Appeal, in addition to holding that the defense could not be relied upon by petitioner, also concluded that it was not tenable because the facts did not support reliance upon this defense. A detailed discussion of this aspect of the case appears at pages 60-63 of the Respondent's Brief which was filed with the District Court of Appeal and has been transmitted to this Court.

E. The Record Does Not Disclose That the Trial Court Refused to Consider the Defense of Entrapment.

It should be noted that in presenting the record on appeal to the District Court of Appeal, the petitioner did not include the argument of either counsel to the trial court after the conclusion of this court trial. [See the Clerk's Transcript, page 24 which discloses that on December 29, 1960, arguments were presented to the trial court by both counsel and note that the Reporter's Transcript which petitioner presented to the District Court of Appeal does not contain those arguments or any comments the trial court may have made thereon.] It is thus clear that the petitioner failed to present a proper record to the District Court of Appeal and to this Court for determination of the issue whether or not the trial court denied him use of the defense of entrapment. The trial court may have permitted the use of this defense and then simply rejected it.

Although the petition alleges "this issue was raised throughout trial and on the motion for a new trial." (Pet. p. 7) the only reference given by petitioner to the record is "C.T. Pages 28-36." Those pages of the Clerk's Transcript contain petitioner's brief in support

of this motion for a new trial and it should be noted that the pages referred to by petitioner merely relate to the conspiracy count and nowhere refer to or use the word "entrapment." If petitioner had been denied the defense of entrapment, it would have been a denial as to all three counts. Yet the portion of the brief to which petitioner refers this court merely relates to the conspiracy count. Furthermore, a close reading of that portion of the brief discloses that it does not relate to entrapment even on that count.

Even assuming that the District Court of Appeal was in error in holding that the defense of entrapment cannot be relied upon if the defendant denies the crime, it cannot be assumed by this Court that the trial court made a similar error since the trial court may have reasoned that the facts would not support the defense of entrapment even if it could be relied upon. Petitioner by failing to bring to this court whatever comments the trial court may have had at the time it found petitioner guilty has failed to show that the trial court erred.

The petitioner states, "The law of California, stated in *People v. Wilburn*, 49 Cal. 2d 714, 321 P. 2d 452 presumes that the trial court applied the law pronounced by the appellate court at the trial of appellant's case." (Pet. p. 10.) Wilburn discusses the sufficiency of evidence to sustain a murder conviction, harmless misconduct by a prosecutor, the defense of insanity, and the presumption that a court gave adequate consideration to a motion by defendant. It does not discuss the proposition of petitioner quoted above. We therefore submit that *Wilburn* is not in point.

III.

The District Court of Appeal Did Not Rely Upon an Unwarranted Concession nor Even if Such Reliance Did Exist, Would There Be Denial of Due Process.

Here again it must be noted that even assuming the District Court of Appeal based its affirmance upon an erroneous concession, it cannot be assumed that the trial court similarly erred. The question before the trial court as well as before the District Court of Appeal with respect to the issue of conspiracy was whether or not the petitioner had knowledge of the conspiracy. This was the crucial and only issue which petitioner in his appeal and in the trial court raised with regard to the issue of conspiracy. This issue was decided adversely to petitioner by the trial court and the District Court of Appeal meticulously set forth the evidence which supports the finding of the trial court that the petitioner had knowledge of the falsity of the claims which he submitted to the insurance company. (See pp. 14-16 of the opinion which is attached to the petition as an appendix.)

Petitioner states that the following sentence in the opinion of the District Court of Appeal erroneously states a concession that he did not make:

> "As noted earlier, appellant concedes that the existence of a conspiracy can be inferred if the evidence shows that he had the knowledge requisite to the commission of the substantive offenses; he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his co-con-

spirators outside his presence would be admissible (*People v. Robinson*, 43 Cal. 2d 132, 137.)" (Appx. to Pet. p. 10.)

However, we believe that it is apparent from a reading of this sentence that what the District Court of Appeal meant was as follows: Petitioner expressly conceded that the existence of a conspiracy as to petitioner depended upon whether or not he had the knowledge required for grand theft and, for a violation of Section 550 of the Insurance Code; petitioner also implicitly conceded that if he had such knowledge, conversations made by his co-conspirators outside his presence would be admissible as to petitioner since petitioner did not challenge the fact that a *prima facie* case of conspiracy between the co-defendants had been established.

Petitioner at no time had argued that the evidence did not establish a *prima facie* case of conspiracy between petitioner's co-defendants who had entered a plea of guilty. Indeed petitioner's motion for a new trial in essence conceded that a conspiracy existed but argued that petitioner was not part of that conspiracy. [See Clk. Tr. p. 32, lines 19-23; p. 34, lines 20-29; p. 35, lines 1-39.]

The above interpretation of the District Court of Appeal's opinion is buttressed by the following quotation from Appellant's Closing Brief, page 35, which has been sent to this court as part of the record:

> "The controlling pertinent fact in this case was that Buchholz and Meng did not sustain personal injury in the respective accidents they reported.
>
> "The question whether a *prima facie* case is

made out against Appellant so as to allow the admission of acts and declarations of his alleged coconspirators into evidence, resolves itself down to the proposition as to whether there is substantial evidence to support a reasonable inference the Appellant knew this pertinent fact:

"There is no evidence in the record to support an inference Appellant had antecedent knowledge of the false practices of Dr. Matloff (see Villabisencio testimony, *Reporter's Transcript, page 509, lines 18 to 23*) or of Dr. Harder (see Jensen testimony, *Reporter's Transcript, page 605 to page 616*)."

IV.

The District Court of Appeal's Construction of Insurance Code Section 556 Is in Accordance With Prior Cases.

Petitioner states at page 16 of the Petition, "Because 'claims . . . under a contract of insurance' have never previously been considered to include tort claims, the application to petitioner of this statute denied him due process and equal protection of the law." However, petitioner has failed to disclose to this court the two prior cases in California which are referred to and relied upon in the opinion of the District Court of Appeal and which had interpreted Insurance Code Section 556 to apply to situations similar to those disclosed under the facts of this case. See *People v. Grossman*, 28 Cal. App. 2d 93 and *People v. Reed*, 190 Cal. App. 2d 344, both discussed in the opinion at pages 19-20 of the appendix to the petition.

V.

There Is No Violation of the Constitution When the People Use Undercover Agents to Catch Persons Engaged in Criminal Conduct.

The evidence which the People used with regard to Count III consisted of both recordings made on a miniphone when the District Attorney's investigator, Meng, went to petitioner's office, and evidence of tape recordings made by Meng at the time that he telephoned petitioner. With regard to Count II, no evidence of either tape recordings or miniphone conversations was introduced by the People as part of their case in chief [Rep. Tr. p. 848.] Instead, as to Count II, the only use given to a miniphone recording was to prove on cross-examination that petitioner had lied in his direct testimony. (See p. 48 of the Respondent's Brief which was filed with the District Court of Appeal of the State of California and transmitted to this Court.) The use, on cross-examination, of unlawfully obtained evidence to prove the falsity of statements made by defendant on direct examination has been approved of by this Court in *Walder v. United States* (1954), 347 U. S. 62, 98 L. ed. 503, 74 S. Ct. 354. Thus, even assuming that there has been some violations of due process as to Count III in connection with the recording of conversations by miniphone or by mechanical means attached to a telephone, no such evidence was used except on cross-examination with regard to Count III and the conviction on Counts I and II would have to be upheld.

Turning now to the evidence used in support of Count III, namely, the recordings made on the mini-

phone and those made of the telephone conversations, it should be noted that the federal courts have approved the use of such evidence. Thus, the use of an undercover agent who surreptitiously tape records the conversations he engaged in with the suspected criminal has been upheld by this Court in *On Lee v. United States* (1951), 343 U. S. 747, 96 L. ed. 1270, 72 S. Ct. 967. Furthermore, based on this Court's opinion in *Rathbun v. United States* (1957), 355 U. S. 107, 2 L. ed. 2d 134, 78 S. Ct. 161, the lower federal courts have approved the use in evidence of recordations made of telephone conversations when one of the parties to the conversation consents to the recordation. See: *Hall v. United States* (5th Cir., 1962), 308 F. 2d 266, cert. denied, 31 Law Week 3219; *Ferguson v. United States* (10th Cir. 1962), 307 F. 2d 787; and *Carnes v. United States* (5th Cir. 1961), 295 F. 2d 598.

Furthermore, petitioner in this portion of his argument appears to attempt to undermine the entire theory of entrapment since the doctrine of entrapment is based upon the distinction between police officers who, posing as members of the general public, seek to discover crime and police officers who inveigle defendants into committing crimes. The law of entrapment is based upon the theory that police officers are entitled to do the former but not the latter. (See *United States v. Bush* (6th Cir. 1960), 283 F. 2d 51, which distinguishes Fraternal Order of Eagles No. 778; *Johnston, Pa. v. United States* (3rd Cir. 1932), 57 F. 2d 93, the case relied upon by petitioner at page 20 of the petition.) Thus, there cannot be any Constitutional violation of petitioner's rights in the use of police officers to dis-

cover petitioner's criminal activities since as pointed out before in Point I of this argument he was not entrapped.

Conclusion.

Petitioner attempts to create substantial federal questions without any evidence or law to support his contentions. The petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1962
No. 686

RALPH R. BENSON,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

REPLY TO RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 680

RALPH R. BENSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

REPLY TO RESPONDENT.

ARGUMENT.

RESPONDENT'S MISCONCEPTIONS.

I.

Education Does Not Affect Petitioner's Standing To Rely on Entrapment.

As applied to the facts of petitioner's case the citation of *Crooker v. California* (1958), 357 U. S. 433, 2 L. Ed. 2d 1448, 78 S. Ct. 1287 and quotation from the opinion of California District Court of Appeal that

> ". . . appellant not thus stand aside and let others determine where the truth lay. . . ."

argues that state agents may act more deceptively against an educated defendant and that education raises a duty to investigate.

The above proposition could not have been tested in petitioner's California proceedings because he was denied standing to rely on the defense of entrapment.

II. A. B. C. D.

Entrapment by Deception Raises a Federal Question.

Respondent's argument under subpoints A. B. C. and D. misconceives that the defense of entrapment is only appropriate to situations where the defendant is persuaded to commit the crime. In such cases "evil" intent arises because it was induced by the persuasion of the police agents. Respondent fails to distinguish the case where police deceptions and misrepresentations cause a defendant to act but such act would only be criminal if done with specific intent. *California Insurance Code* 556 provides in part:

> "It is unlawful to: (a) Present or cause to be presented any false or fraudulent claim . . ."

Petitioner presented evidence that he did not know and that no one advised him that the claims were false or fraudulent. Because the trial court, the District Court of Appeal and the Respondent still fail to distinguish these types of entrapment, petitioner was and still is denied any standing as to the defense of entrapment.

People v. Benford (1959), 53 Cal. 2d 1 quoted by respondent considers the situation where defendant is persuaded to adopt a criminal intent and thereafter commits a criminal act. If under the facts of *Hansford v. United States* (1962), 303 F. 2d 219, which were of the type considered in the *Benford* case, the court required that the accused be given standing to raise

defense of illegal entrapment although he denied commission of the offense, such a rule is more appropriate in the instant situation where petitioner proved that he would not have done the acts alleged but for the deceptions and misrepresentations of the police agents.

In the instant case the court enlarged the requirement of admitting the commission of the act alleged to a requirement of admitting the commission of the crime.

II. E.

Entrapment Was Raised in the Trial Court.

Respondent argues "it should be noted that the pages referred to by petitioner merely relate to the conspiracy count." However the substantive counts could not have been sustained on any basis other than finding petitioner a party to the conspiracy. The prosecution's case stood or fell on proof of petitioner's participation in the conspiracy alleged.

In his motion for a new trial, petitioner's counsel argued entrapment by misrepresentation in substance. Use of the label "entrapment" is not required.

However, the fact that the California District Court of Appeal considered the defense of entrapment resolves the question whether entrapment was properly presented in the California Courts.

> "There can be no question as to the proper presentation of a federal claim where the highest state court passes on it. See *Manhattan Life Insurance Company vs. Cohen*, 234 U. S. 123, 134."
>
> *Raley v. Ohio*, 360 U. S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344.

III.

Concession Against Petitioner of Prima Facie Proof of Conspiracy Denied Him Due Process.

Respondent's interpretation of the portion of the opinion of the California District Court of Appeal quoted and discussed on pages 12, 13 and 14 is not that which the District Court of Appeal intended. This is evidenced by the fact that it affirmed admission of fifteen conversations against petitioner which would have been hearsay as to him in absence of *prima facie* proof of his participation in conspiracy.

Respondent argues that the District Court of Appeal was only referring to *prima facie* proof of conspiracy between petitioner's co-defendants. However, without the unwarranted statement that petitioner made a concession of *prima facie* proof of conspiracy in its opinion, there could have been no basis for the admission of the conversations against the petitioner. Petitioner argued lack of *prima facie* proof of conspiracy at every stage of his proceedings and is denied a fair consideration of his case by the District Court of Appeal if the latter bases its opinion on fiction rather than evidentiary fact.

IV.

California Courts Have Not Construed the Phrase in Section 556 Insurance Code in Any Previous Criminal Case and Applying a Construction to Petitioner Contrary to Their Construction of This Phrase in Civil Cases Have Denied Him Due Process and Equal Protection of Law.

Respondent's claim that *People v. Grossman*, 28 Cal. App. 2d 93 and *People v. Reed*, 190 Cal. App. 2d 344 have interpreted Section 556 to apply to liability insurance is inaccurate. In neither case did the appellant raise at trial or argue on appeal the question whether the statutory phrase "claims under a contract of insurance" embraced tort claims.

V.

Objection Was Duly Made on Constitutional Grounds to Evidence Secured by Entry Gained by Misrepresentation and Deception as to Testimony of Prosecutor's Agents on Their Difect Examination.

Petitioner objected to state court's admission of conversations that took place in his office following entry gained by police by means of deception and misrepresentation. Some of the conversations were recorded and used in cross-examination. But the objection went to the testimony of the police agents on direct. Evidence admitted during cross-examination did not establish any of the counts against petitioner. Nor does a fair reading of the record show that petitioner was impeached in any respect by the admission in evidence of the recording during cross-examination.

The record in the instant case discloses affirmative misrepresentation of the type recently discussed in *Wong Sun v. U. S.*, 31 Law Week 4079.

Respectfully submitted,

RALPH R. BENSON,
Petitioner, Pro. Se.